

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

APR 20 2011

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2011-0009-PR
)	DEPARTMENT B
Respondent,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
DAVID BERNARD CLARK,)	the Supreme Court
)	
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF COCHISE COUNTY

Cause No. CR201000009

Honorable Wallace R. Hoggatt, Judge

REVIEW GRANTED; RELIEF DENIED

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By Sandra Slaton

Scottsdale
Attorneys for Petitioner

V Á S Q U E Z, Presiding Judge.

¶1 Petitioner David Clark seeks review of the trial court's order denying his petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P., in which he alleged Arizona's sex offender registration statute violated his state and constitutional rights, his sentence constituted cruel and unusual punishment, and his plea had not been supported by a sufficient factual basis. "We will not disturb a trial court's ruling on a

petition for post-conviction relief absent a clear abuse of discretion.” *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). Clark has not sustained his burden of establishing such abuse here.

¶2 Pursuant to a plea agreement, Clark was convicted of failing to register as a sex offender as required by A.R.S. § 13-3821. The trial court imposed an enhanced, “somewhat mitigated,” 3.5-year term of imprisonment. Thereafter, Clark initiated proceedings pursuant to Rule 32, arguing in his petition that (1) Arizona’s sex offender registration statute cannot be applied retroactively, (2) the registration requirement violates his right of protection against double jeopardy, (3) the registration requirement violates A.R.S. § 1-246, (4) his “sentence of imprisonment violates the Eighth Amendment’s prohibition of cruel and unusual punishment,” and (5) there was insufficient factual basis for his plea and a related “possible claim for ineffective assistance of counsel.”

¶3 The trial court summarily denied relief on Clark’s petition, concluding that this court had “considered and rejected” his arguments related to the sex offender registration statute in *State v. Henry*, 224 Ariz. 164, 228 P.3d 900 (App. 2010), that Clark’s sentence was not cruel and unusual punishment, and that “[t]he factual basis was more than sufficient to support [Clark]’s guilty plea.” On review Clark abandons his claim of an insufficient factual basis for his plea and the related claim of ineffective assistance of counsel¹ and reurges the remaining arguments he made below, asking us to reexamine our decision in *Henry*.

¹Because Clark makes no argument as to this issue on review, we do not address it. *See* Ariz. R. Crim. P. 32.9(c)(1) (petition for review shall contain “the reasons why the petition should be granted” and “specific references to the record”).

¶4 We decline Clark’s invitation to overrule our decision in *Henry*. A previous decision by this court is “highly persuasive and binding” upon us, “unless we are convinced that the prior decision is clearly erroneous or conditions have changed so as to render the prior decision inapplicable.” *State v. Dungan*, 149 Ariz. 357, 361, 718 P.2d 1010, 1014 (App. 1985). Clark has not persuaded us that our previous decision was erroneous, and he has not suggested that conditions have changed in the year since our decision issued rendering it inapplicable. In view of our decision in *Henry*, the trial court correctly rejected Clark’s first three claims. 224 Ariz. 164, 228 P.3d 900.

¶5 The trial court also correctly rejected Clark’s remaining claim—that his sentence constituted cruel and unusual punishment. As the court pointed out, Clark stipulated to the 3.5-year prison term he received, and he raised no objection to it as cruel and unusual. He thereby waived any such claim and it is precluded. *See* Ariz. R. Crim. P. 32.2(a)(3). The trial court therefore could have rejected the claim solely on that basis. Thus, although we grant the petition for review, we deny relief.

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

CONCURRING:

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Judge

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge